Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes And Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

JOINT COMMENTS OF:

CORNERSTONE PROPERTIES
CRESCENT REAL ESTATE
DUKE-WEEKS REALTY
HINES INTERESTS LIMITED PARTNERSHIP
LEGACY PARTNERS
THE LURIE COMPANY
METROPOLITAN LIFE INSURANCE COMPANY
PRENTISS PROPERTIES
RUDIN MANAGEMENT COMPANY
SHORENSTEIN COMPANY
SPIEKER PROPERTIES
TRIZECHAHN OFFICE PROPERTIES

Dated August 27, 1999

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INTRODUCTION

Cornerstone Properties, Crescent Real Estate, Duke-Weeks Realty, Hines Interests Limited Partnership, Legacy Partners, The Lurie Company, Metropolitan Life Insurance Company, Prentiss Properties, Rudin Management Company, Shorenstein Company, Spieker Properties, and TrizecHahn Office Properties (collectively referred to herein as the "Joint Commenters") hereby submit Joint Comments in response to the Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 ("Notice").

The Joint Commenters own commercial and residential multi-tenant buildings throughout the United States. Together, we own or manage over 1,000 buildings, encompassing over 500,000 million square feet of tenant space. Our buildings are located in more than half of the states. Our holdings include the Sears Tower in Chicago, the largest commercial building in North America; Stuyvesant Town and Peter Cooper Village, a residential apartment complex in Manhattan with over 11,000 living units; and the New York Information Technology Center, a global leader in telecommunications intensive buildings. Our holdings also include smaller office buildings, residential complexes, and commercial office towers located in suburban office parks and urban downtowns throughout the country.

We support the comments filed by the Building Owners and Managers Association ("BOMA"). We offer our Joint Comments as individual building owners to emphasize the challenges and experiences we face in managing our buildings and portfolios to ensure that our tenants have access to a choice of competitive telecommunications services and providers.

These Joint Comments are supported by the accompanying *Technical Report,* prepared by Riser Management Systems, L.P. on behalf of the Joint Commenters.

SUMMARY

Building owners, not the Federal Communications Commission ("Commission") or telecommunications service providers ("TSPs"), are best situated to manage the use of telecommunications spaces in multi-tenant buildings. Building owners have a natural economic interest in making their buildings as attractive as possible to tenants, and increasingly this depends on the telecommunications environment. Commission regulation of building owners would not only extend beyond statutory authority, it also would be unwise, unnecessary, and ultimately destructive of tenant choice.

Although TSPs may argue that building owners are stifling competition, robust telecommunications competition is occurring most frequently today in multi-tenant buildings, including buildings owned by the Joint Commenters. The reason for this is simple: tenants are demanding competitive services and owners are responding. Federal regulation, at a time when competition is truly beginning to flourish, may undermine rather than advance competition.

Telecommunications spaces in buildings—from basements, through risers, to rooftops—are valuable and limited commodities. TSPs seeking access to serve tenants in the buildings are eager to occupy that space. Because of space limitations, however, there is a point in every building beyond which there is simply not enough physical space to accommodate additional facilities-based competition among TSPs. By encouraging a "land grab," federally mandated facilities-based competition will squander the constrained space, preventing tenants from gaining access to new TSPs in the future.

Given the uniqueness of each building, space limitations, and other related factors, the Commission can best promote competition in multi-tenant buildings by

allowing owners to manage the use of telecommunications spaces and to choose among the following options for delivering competitive services to tenants:

1. Building owners should have the right to allow TSPs to install their own facilities in the building under market-negotiated terms and conditions. TSPs should not, however, have a mandated right of access to the buildings. Such mandatory access rights would deprive owners of the ability to manage building spaces in an efficient and appropriate manner and are likely to result in less, not more competition.

2. Building owners should have the right to insist that any TSP (including the ILEC) that installs wiring in the building should be required to make such wiring available to other TSPs. Service-based competition will allow owners to attract a larger number of TSPs to the building because space limitations will not be an issue.

3. Building owners should also have the right to install or manage their own facilities in the building and require all TSPs (including the ILEC) to use those facilities upon market-negotiated terms and conditions for providing services to tenants.

Building owners are already working with TSPs to deliver tenants competitive telecommunications services in multi-tenant buildings through a variety of means. Building owners and TSPs will continue to work together to meet the needs of the customers they share, without government regulation. Building owners play a vital role in managing all aspects of their buildings to increase tenant satisfaction and maintain a safe and secure working and living environment. Building owners must continue to manage telecommunications access to their buildings if tenant needs for such services are to be met over the long term.

DISCUSSION

I. The Commission's Objective should be to Maximize Tenant Access to Competitive Telecommunications Services, not to Promote the Interests of Individual TSPs

The Commission initiated the Notice to determine what action, if any, it should take to help promote delivery of competitive telecommunication services to end users in multi-tenant buildings—our tenants. We fully support the Commission's goal of creating a competitive market for local telecommunications services. Indeed, as owners of commercial and residential multi-tenant buildings both large and small, we have already taken significant steps to provide our tenants with a wide choice of services from competing TSPs.

The Commission, however, approaches this goal almost entirely from the perspective of the TSP, not of the customer. Congress adopted the 1996 Act not to ensure TSP access to end users, but rather to ensure that *end users have access* to an array of services and TSPs. While there is some commonality of interest between TSPs and tenants, there are also sharp divergences.

TSPs are concerned with gaining rapid access to customers at the lowest possible cost to increase their market share, profit margin, and shareholder value. They seek a connection to their customers that meets the technical specifications necessary to deliver the desired services and that is secure against accidental disruption, sabotage, and theft of proprietary customer information.

Tenants are also concerned with the security, reliability, and rapid delivery of the telecommunications connections they rely on for business or personal use. But tenants also seek flexibility—a choice of sophisticated services from multiple providers, at competitive prices. Moreover, telecommunications service is not a tenant's only or primary concern. Tenants require many other amenities and utilities from the building in which they lease space. They are concerned about adequate parking, elevators, safety, security, floor space, rent levels, reliable power, convenient shops and services—all of the many things that create a comfortable working and living environment.

Tenants rely upon the building owner to meet or facilitate their needs for many of these services, including telecommunications. The best way to encourage competition for local telecommunications services within multi-tenant buildings is, therefore, not to grant TSPs special access privileges to these buildings, but to allow building owners to bring telecommunications services to tenants in the manner most efficient and most suitable for their particular building. In accepting the TSPs' frame of reference, the Commission would limit both its and building owners' options for establishing a full range of policies to benefit building occupants. The focus of this proceeding, therefore, should not be on providing special rights to TSPs, but on increasing the choices available to tenants to access competing TSPs.

II. Commission Regulation of Building Owners is Neither Necessary nor Permitted

One of the primary issues raised in the Notice is the question of whether extending Commission regulation to building owners is necessary in order to advance local telecommunications competition in multi-tenant buildings. The answer is no. The multi-tenant environment is the one place where local competition *is* flourishing. Building owners across the country, including the Joint Commenters, have been actively engaged in bringing competitive services and providers to their tenants. Building owners are compelled by market forces to promote telecommunications competition within their buildings because building owners, not TSPs, are in the business of meeting tenant needs. In any event, the Commission's jurisdiction, which is specifically established by Congress, does not extend to building owners.

A. Buildings Owners are Actively and Successfully Bringing Competition to their Tenants, without Commission Regulations

While local telecommunications competition may be lagging in some markets, it is flourishing in multi-tenant buildings.[1] Even before Congress adopted the Telecommunications Act of 1996, some owners of commercial and residential multi-tenant buildings began offering tenants access to the advanced services provided by competitive TSPs. Since the 1996 Act, TSP presence in multi-tenant buildings has exploded. For example, at the end of 1996, WinStar had access to less than 800 buildings. As of June 30, 1999, it had access rights to over 5,500 buildings, and expects to be in over 8,000 buildings by the end of 1999. The second quarter of 1999 was the fifth consecutive quarter in which WinStar gained access rights to more than 500 buildings. (WinStar Press Release, August 19, 1999).

Teligent's history is similar. Founded just two years ago, Teligent now has access agreements for over 4,200 buildings. In fact, according to Teligent's Chairman and CEO, Alex J. Mandl, Teligent is "making great progress in securing access rights to customer buildings. At the end of the second quarter, we had signed leases or options for 4,252 customer buildings. That's up 37 percent from the total at the end of the first quarter. Because of that excellent performance, we've raised our target for the number of

[1] The Commission acknowledges that the growth of competition "appears to be directly benefiting only certain classes of telecommunications service users, for example, business customers in more urbanized areas." Notice at ¶ 13. Interestingly, it is primarily this same group of "business customers"—tenants of multi-tenant buildings—that the FCC is attempting to benefit through this rulemaking proceeding.

buildings we expect to have under lease or option by the end of the year to 6,000." (Teligent Press Release, August 11, 1999.)

Other TSPs, such as MCI WorldCom, Level 3 Communications, and RCN have also been very active and successful in gaining access to business and residential customers in multi-tenant buildings.

The Joint Commenters, like most building owners, have not been on the sidelines. Understanding the importance of bringing competitive telecommunications services to our tenants, we have been developing and implementing telecommunications strategies, working to attract TSPs to our buildings, and signing numerous license agreements with TSPs on portfolio and per-building basis. The success we have enjoyed in this regard, without governmental intervention, is evidenced by the following highlights of telecommunications activity in our buildings and portfolios:

- Cornerstone Properties has signed numerous agreements with ICG, MCI WorldCom, TCG/AT&T, Teligent, WinStar, and others.

- Crescent Real Estate has large multi-building agreements with Level 3, Teligent, and WinStar as well as a number of other single building agreements.

- Duke-Weeks Realty has multiple-building access agreements with MCI WorldCom, McLeod USA, NextLink, Teligent, and Time Warner, as well as single building access agreements with SkyTel, Sprint, TCG/AT&T, and others.

- Hines Interests Limited Partnership has signed agreements with Cypress Communications, MCI WorldCom, TCG/AT&T, Teligent, WinStar, and others.

- Legacy Partners has signed agreements with ART, Electric Lightwave, MCI WorldCom, SkyTel, Sprint, TCI, TCG/AT&T, Teligent, Viacom, and WinStar among others.

- The Lurie Company has signed agreements with 21st Century Telecom, Forward Network Communications, Intermedia, MCI WorldCom, TCG CERFnet, TCI, Teligent, WinStar, and others. Lurie has retrofit its landmark Chicago buildings 120 South LaSalle and the LaSalle-Wacker Building—built in 1928 and 1930, respectively—with copper and fiber-optic cabling to bring its tenants high-speed, broadband telecom capabilities.

- Metropolitan Life Insurance Company contracted with a competitive TSP to provide competitive services such as local, long distance, Internet, and cable TV services to its tenants in approximately 11,000 apartment units at MetLife's Stuyvesant Town and Peter Cooper Village in New York City.

- Prentiss Properties has signed agreements with ART, AT&T, MCI, Shared Technology, Sprint, Teligent, WinStar, and others.

- Rudin Management Company pioneered a new concept in real estate by retrofitting 55 Broad Street in New York City with a state-of-the-art communications distribution system. Tenants use building-owned fiber-optic and high-speed copper cables to access five CLECs, seven long-distance carriers, and eleven ISPs at the building dubbed the New York Information Technology Center. Rudin's new mantra reflects the current thinking of many building owners: "location, bandwidth, location." Rudin has been so successful in making competitive services available to its tenants that Teligent recognized Rudin in its 1998 annual report to shareholders.

- Shorenstein Company has taken advantage of PacBell's inside wire tariff, which establishes the demarcation point at the MPOE, by actively managing the inside wire of its California buildings. Shorenstein has signed agreements with a number of competitive TSPs, including ART, Colomotion, Covad, IXC Communications, Kivex, Level 3, MCI WorldCom, Qwest, Metromedia, Netsworks, TCG/AT&T, TCI, Teligent, and WinStar.

- Spieker Properties has signed national agreements with ART, Teligent, and WinStar. In fact, WinStar noted in its 1998 annual report that it is obtaining a record number of building access rights through individual building owners and accessing major commercial office building portfolios such as Spieker's.

- TrizecHahn Office Properties has an average of three to four competitive TSPs serving most of its buildings in the United States, and is actively engaged in negotiations to bring additional TSPs into its buildings.

The success of the Joint Commenters in bringing competitive telecommunications services to our buildings is by no means unique. Many other building owners are doing likewise for the same compelling reason: our business is tenant satisfaction. TSPs, however, would have the Commission create new rules based upon the occasional alleged exception, rather than the tens of thousands of successes they describe to their shareholders.

B. Building Owners Have a Strong Economic Interest to Meet Tenant Demands for Competitive Telecommunications Services

Governmental regulation is unnecessary where, as here, the open market properly serves the consumer. Markets will punish shortsighted owners who fail to accommodate their tenants' needs—tenants will move out, the building's rents will fall, the building will become vacant, and the building owner will be out of business. Building owners know that their success lies in providing increased value for tenants. When tenants demand access to today's advanced telecommunications from competitive TSPs, owners listen and respond. The market leaves them no other viable choice; building owners must bring advanced telecommunications competition into their buildings.

Despite these strong economic forces, however, some TSPs insist that government intervention is necessary. Such intervention, however, is not only unnecessary, it is impractical. Each multi-tenant building and its tenants have unique and distinctive needs. Some multi-tenant buildings have only two or three tenants; others have hundreds. Risers and closets in some buildings may have ample space; in another, they may be severely overcrowded. Telecommunications services may be a priority for the majority of tenants in one building, and not in another. Clearly, one size does not fit all.

The Commission cannot possibly implement effective telecommunications regulations that will accommodate all of these different needs and circumstances. Such management, however, is precisely the job and the responsibility of the building owner: to understand the uniqueness of the building, to balance the needs of all the tenants, and to develop sound policies for all aspects of building operations, including telecommunications. As more and more TSPs seek access to their buildings, it has become increasingly crucial for owners to manage properly their buildings' telecommunications spaces, pathways, and systems to ensure that appropriate competitive services are available to all tenants, not just a select few. Building owners, not TSPs or the Commission, are in a position to manage effectively telecommunications access to multi-tenant buildings, as evidenced by their many successes in balancing the competing interests within their buildings and bringing a choice of sophisticated telecommunication services to their tenants.

C. The Commission's Proposed Rule Changes, as they Pertain to Building Owners, Exceed the Commission's Statutory Authority

The proposed initiatives to regulate the activities of building owners far exceed the Commission's statutory authority and raise serious Constitutional questions. The Commission's reliance on its ancillary jurisdiction under §§4(i), 224, and 303(r) of the 1996 Act is misplaced and is contrary to recent judicial and Commission precedent.

As Commissioners Michael K. Powell and Harold Furchtgott-Roth observe in this proceeding, under applicable case law, the Commission may not adopt rules that would result in a *per se* taking without specific authority to do so. (See Separate Statement of Commissioner Powell Concurring, and Statement of Commissioner Furchtgott-Roth, Concurring in Part and Dissenting in Part, both citing *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994)).

Portions of the Commission's proposed regulation, however, would do just that by imposing mandatory, non-discriminatory access requirements on building owners, prohibiting entry into exclusive contracts with TSPs, and nullifying existing contracts. TSPs would also have unrestricted access to in-building conduits, risers, rooftops, and other private "rights-of-way" that a utility "owns" or "controls" in a building owned by a third party, without compensation to, or permission from, the building owner. Under applicable case law, all of these measures would constitute *per se* "takings" under the Fifth Amendment against a readily "identifiable class" of persons. (See, *e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Bell Atlantic v. FCC, supra; Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, Second Report and Order,* 1998 FCC LEXIS 5954 (1998) (*OTARD Second Report and Order*)).

The Commission's proposed rules likewise exceed its statutory mandate by regulating matters that are quintessentially under state—not federal—jurisdiction. (See, *e.g., Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986); *cf. AT&T Corporation v. Iowa Public Utilities Board*, __ US __, 1999 WL 24568 (January 25, 1999)). The contractual and real property rights of multi-tenant building owners are well outside the scope of the 1996 Act. The Commission's proposal, if adopted, would establish a broad federal intrusion into these matters.

Nothing in the 1996 Act authorizes the Commission to adopt such broad, aggressive measures. For example, §303(r) of the 1996 Act, upon which the Commission relies, relates solely to the Commission's authority over "the use of radio." While the Commission and the courts have interpreted this provision broadly to include services ancillary to broadcasting, such as cable television, the Commission's reliance on §303(r) to justify the regulation of non-licensee private property owners is virtually unprecedented and without legal support.

Weakest of all is reliance on §4(i) of the 1996 Act, which authorizes the Commission to "perform any and all acts ... not inconsistent with this 1996 Act, as may be necessary in the execution of its functions." As its plain language reflects, this provision merely provides the Commission with ancillary authority to promulgate rules that might be required in order for the Commission to meet its principal statutory obligations. Nowhere in the 1996 Act, however, has Congress vested the Commission with confiscatory authority over private property owners, or otherwise interfered with the contractual rights of this class of persons. Nor can it be argued that the Commission's proposed initiatives are "necessary in the execution of its functions" in the absence of any effort by the agency to explore less intrusive alternatives.

Less than ten months ago the Commission declined to impose an affirmative obligation on building owners to allow a tenant access to building common and rooftop areas for the placement of over-the-air video reception devices because it would have interfered with the owner's private property rights. The Commission found that "because there is a strong argument that modifying our §207 rules to cover common and prohibited access property would create an identifiable class of *per se* takings, and there is no compensation mechanism authorized by the statute, we conclude that §207 does not authorize us to make such a modification." (*OTARD Second Report and Order, supra.)*

As a majority of the Commissioners observe, in the instant proceeding the Commission proposes "a seemingly greater intrusion into the rights of property owners than [it] could stomach in the OTARD proceeding," with far less statutory foundation. (Separate Statement of Commissioner Powell, *supra*. See also Separate Statement of Commissioner Furchtgott-Roth, *supra,* and Separate Statement of Commissioner Susan

Ness). Moreover, in contrast with the adoption of its original physical co-location requirement governing TSPs, the Commission's authority over multi-tenant building owners is far more dubious. Under these circumstances, and in light of the serious Constitutional infirmities involved, "this is not an area where [the Commission] should be pushing the envelope of [its] 'ancillary' statutory authority without, at least, being certain [it] has exhausted other alternatives." (Statement of Commissioner Powell, *supra*.)

III. Barrier to Competition is not Lack of Access to Multi-tenant Buildings, it is the Market Power of the ILECs and the Business Plans of TSPs

A. <u>ILECs Create a Barrier to Local Competition in Multi-Tenant Buildings by using their Significant Market Power to Demand Special Treatment</u>

In various sections of the Notice, the Commission lumps together references to both the incumbent local exchange carriers ("ILECs") and building owners as potential bottlenecks. The Joint Commenters take great exception to such "guilt by association." Building owners have not had the ability to curtail unfair ILEC practices. ILECs demand access to buildings, but refuse to sign agreements with building owners, pay license fees, or otherwise accept the terms and conditions the building owner has set for access by *all* TSPs, often threatening to withhold service from tenants. Given the tremendous market power of the ILECs and the tenant demand for their service, an owner can do little in these circumstances but give in to their demands.

For example, in the summer of 1998, U S WEST approached Legacy Partners (formerly Lincoln Property Company) and demanded access to a building in Denver to upgrade its facilities in the building to meet the needs of a particular tenant. As in all cases where a TSP seeks access to one of its buildings, Legacy presented U S WEST with a standard Telecommunications License Agreement (similar to BOMA's model agreement in *Wired for Profit*). U S WEST refused to consider the agreement and refused to pay the same level of fees paid by its competitors. Given the needs of the tenant, Legacy decided to concede many of U S WEST's demands and sent to U S WEST a one-page, short-form license granting U S WEST limited rights to install and operate the needed additional facilities. The license contained three basic conditions: (1) that U S WEST submit to the owner engineering plans for approval prior to construction; (2) that U S WEST perform the work in a craftsmanlike manner and repair any damage to the building that it may cause; and (3) that U S WEST indemnify the owner from any injury caused by U S WEST's actions. Again, however, U S WEST refused to accept these terms and declined to upgrade its facilities. Adding insult to injury, U S WEST then threatened to remove some existing cabling in the building that it had previously installed and that, by its own admission, "may not be compliant with the National Electric Code." (Letter from U S WEST to Lincoln Property Company, dated July 29, 1998). Fortunately, Legacy was able to bring in competing TSPs that accepted the building's standard access terms to provide the needed services to the tenant.

Often, however, building owners have had no alternative but to give in to the ILECs' demands, and are consequently forced to treat ILECs differently than other competitive TSPs in order to maintain tenant satisfaction. Competitive TSPs then claim that they are being discriminated against. Thus, building owners are squeezed between the unreasonable demands of the ILEC on the one hand and TSP discrimination claims on the other. Unfortunately, this predicament will not change until market and regulatory forces allow building owners to say "no" to the ILECs' unreasonable demands and to oblige ILECs to accept the same, non-discriminatory terms and conditions for access as do other TSPs.

The Commission should take steps to prevent the ILECs from using their significant remaining market power to demand special treatment, requiring ILECs to operate in buildings under the same terms and conditions as their competitors.

B. CLEC Business Plans Target Specific Customers, They do not Seek to Deliver Competitive Services to a Broad Market Segment

Some TSPs claim that the lack of free and unfettered access to multi-tenant buildings is a significant barrier to competition. If only they were granted a federally mandated right to access multi-tenant buildings, they argue, local competition in these buildings would flourish, and tenants of these buildings across the country would benefit. Such TSP arguments and claims to promote the interest of *all* tenants are fallacies.

TSPs act on behalf of tenants only to the extent it furthers their own business plans, which is understandable in a competitive environment. TSPs clearly articulate this position in their business plans, which identify the limited types of tenants and buildings targeted. For example, WinStar, in its 1998 Annual Report to Shareholders, states that part of its business plan is to “identify the individual buildings *we* want to put on our network.” (WinStar’s 1998 Annual Report at 17, emphasis added.) According to WinStar, these are the highest-margin buildings in the most lucrative markets. (See slide presentation by Nathan Kantor, President and Chief Operating Officer, at WinStar’s July 1, 1999 Annual Meeting of Shareholders.)

Likewise, Teligent’s target market is small and mid-sized companies in 74 major metropolitan areas. (Teligent’s 1998 Annual Report at 2.) RCN’s target market represents only the most densely populated areas along the northeast corridor and in

California. (RCN Company Profile. www.rcn.com/investor/index, August 27, 1999.) Finally, Level 3's interest lies only with specific business customers within specific locations. (Level 3 Company News, ws0den.level3.com/CompanyNews/forbes.html, July 30, 1999.)

These business plans and target markets may represent sound and appropriate business decisions. They have resulted in and will continue to produce competition for many residential and commercial tenants of multi-tenant buildings. But they will *not* ensure tenants of all multi-tenant buildings access to a choice of telecommunications services and TSPs—they will leave the vast majority of commercial tenants with minimal access to competitive telecommunications services, and residential tenants with even fewer choices.

IV. Building Owners Should be Allowed to Choose Among Many Workable Solutions for Providing Competition in Multi-Tenant Buildings

The Commission can best promote end user access to competitive local telecommunications services in multi-tenant buildings by allowing building owners and TSPs to negotiate TSP access to tenants on several different bases. In fact, many of these options are already being used today in the open market. Building owners and TSPs will continue to work together to meet the needs of the customers they share. It is imperative, however, that the Commission does not infringe upon building owners' rights to manage their buildings safely and appropriately to meet tenant needs. Unfortunately, the rules contemplated in the Notice would do just that. For example, giving TSPs mandated access to multi-tenant buildings would not only be beyond the Commission's statutory authority (as discussed above in section II(C)), it would seriously impair building owners' ability to manage their buildings to ensure tenant satisfaction. Furthermore, due to space limitations within multi-tenant buildings, such rules would ultimately stifle the very competition they are intended to encourage.

A. Mandated Facilities-Based Competition is Unworkable due to Space and Resource Limitations

Facilities-based competition undoubtedly has an important role to play within multi-tenant buildings. Many building owners and TSPs have chosen and will continue to use this method of delivering competitive service to tenants of multi-tenant buildings. Facilities-based competition, however, is successful only when the building owner is allowed to manage such TSP access by selecting TSPs based on service quality and ability to meet tenant service needs, reviewing and approving installation plans, and negotiating licenses for access with reasonable terms and conditions to protect the building, the building's tenants, and other TSPs in the building. Building owners and TSPs, meeting and working together in the open marketplace, have established mutually agreeable arrangements for facilities-based competition in multi-tenant buildings across the country.

Some TSPs argue, however, that they should have a federally mandated, non-discriminatory right to access and install facilities within privately owned buildings. Such mandated facilities-based competition within multi-tenant buildings will not ensure tenant access to competitive services. On the contrary, not only will it impose severe safety, security, and liability burdens on the building owner, in the long run it will create a barrier to competitive TSP access due to limited building telecommunications spaces. The mandatory access rules contemplated in the Notice would not ensure end users in multi-tenant buildings across the country access to competitive services; they would only give TSPs a *carte blanche* to access the "target" buildings of their choice. Such statesanctioned “cherry picking” will serve only the interests of TSPs, not of end users, and should not be endorsed by the Commission.

1. Building Owners Must be able to Manage Building Spaces and Operations Properly and Efficiently

A multi-tenant building is a complex environment in which many different parties—including tenants, utilities, and services—each with their own needs for space, security, and support services, must coexist. It is the job and responsibility of the building owner not only to meet the needs of the tenants for the services on which they rely, but also to ensure that the building is a safe and secure working or living environment for *all* of its tenants. That task requires rigorous management—from the boiler room in the basement to the luxury restaurant in the penthouse, all of the building’s spaces, functions, users, and visitors must be coordinated smoothly. It requires a careful eye on security, life-safety systems, and federal, state, and local codes and regulations, and insurance to cover liability.

Facilities-based TSP access to multi-tenant buildings impacts—directly or potentially—all of these concerns. As described in detail in the accompanying *Technical Report*, a TSP must install either a cable entrance or rooftop antenna, fit up an equipment space, and run cabling through the building’s vertical risers to reach tenant floors. This process is not “invisible” to the building—far from it. Installation of TSP facilities almost always involves construction, TSP personnel access, and the consumption of valuable floor and riser space. The potential for a host of negative consequences—including security breach, interference with a critical building system, disruption to other tenants, damage to the building, installation code violation—for which the building could be held liable is very real.

It is imperative that the building owner be allowed to manage/coordinate installation of TSP facilities, as they are doing today, by working with TSPs to meet tenant needs while not adversely affecting other crucial building operations. The building owner is the only party with the interest, expertise, and neutrality to manage/coordinate telecommunications access to a multi-tenant building, each of which has its own unique physical layout and infrastructure, tenant population, and needs. It is neither appropriate nor practical for a federal or state agency to attempt such a highly individualized task, or—even worse—for such a task to be left undone, as would be the result under mandatory access rules.

Mandatory access rules would allow TSPs access to buildings regardless of whether their service offerings, reliability, and quality match tenant demands. Moreover, a poor-quality TSP not only creates a dissatisfied tenant, it reflects badly upon the building as a whole, decreasing the building's status and overall value. For many building owners, this is such a significant issue that they include provisions in access agreements requiring TSPs to maintain certain performance standards. Mandatory access would remove a building owner's ability to ensure that tenants gain reliable, quality services from TSPs that increase, not diminish, the building's value by adding an amenity, not a liability.

Mandatory access regulation would severely restrict a buildings owner's ability to manage/coordinate the installation and operation of telecommunications facilities in their buildings. As noted in the *Technical Report*, the absence of such management would seriously and negatively impact tenants, competitive TSPs, and the building owner in the following ways:

- The interests and rights to use crucial building spaces would be subordinated to many competing parties, each without an interest in the overall tenant environment or an understanding of a building's systems and design.

- Unmanaged TSP installations may result in inefficient use of constrained telecommunications spaces, reducing the total telecommunications capacity of the building and the ability of tenants to access competing TSPs in the future.

- Unmanaged TSP installations have greater potential to disrupt crucial building systems or other tenants, increasing the building's liability.

- TSP installations may reach or meet the needs of only select tenants while making it more difficult for other tenants to access services of competing TSPs.

- Multiple facilities require access by multiple TSPs for maintenance, increasing security, liability, and administrative costs for owners.

- The owner's ability to negotiate arrangements with TSPs on the basis of service sophistication, quality, and tenant need will be reduced.

The proposed mandatory access rules would deny owners the ability to adequately allocate scarce building spaces in an efficient manner; compromise owners' ability to provide sufficient security; prevent owners from receiving fair compensation for the occupied space and for the increased administrative burden created by each TSP; impose additional costs on owners, who must respond to the TSPs' demands for access; and take away owners' ability to balance the needs of all of their tenants in a building. Moreover, a building owner will have no leverage to negotiate a TSP installation that serves the entire building, meaning that a hard to reach or "non-target" tenant (most often a small tenant on an upper or lower floor) could go without service if a TSP is unwilling to install wiring to serve it.

2. Mandatory Access is Ultimately Detrimental to Tenant Choice, TSPs, and the Building due to Physical Space Constraints

Crucial telecommunications spaces in building basements, rooftops, and risers are limited. Moreover, these spaces are in demand for both telecommunications (*e.g.* tenant-owned equipment and inter-floor cables for telecommunications or computer networking) and non-telecommunications purposes (*e.g.* plumbing pipes, electrical conduit, building control electronics, and HVAC equipment).[2] Mandatory access regulation would prevent the efficient use of these spaces.

Mandatory access policies will in the long run actually impede tenant access to competitive TSPs and their services. While initially it may be easy for a new TSP to establish a presence in a building with an unmanaged and poorly maintained inside wiring system, under such conditions, space will eventually run out. As additional TSPs seek access to multi-tenant buildings to serve tenants, there will come a time when there is no practicable way to accommodate one more wire or dish. It is also likely that some TSPs, having consumed these spaces, will go out of business or leave the building because they were not successful in attracting customers, stranding their facilities in the building (for the owner to remove at its cost in order to make room for other TSPs) and their customers.

The impact on end users in these circumstances would be at best neutral, and at worst result in poorer service, higher costs, and limited choice among TSPs. Telecommunications pathways and spaces, once consumed, are no longer available to

[2] The *Technical Report* further explains the limited dimensions and multiple uses of these common building spaces for many crucial building functions and services.

other TSPs seeking to serve building tenants—a grave prospect indeed to a tenant with a ten-year lease in the building.

Careful oversight of TSP installations and allocation of telecommunications spaces to meet the building's long-term needs is, therefore, a vital responsibility, one best entrusted not to TSPs, tenants, or government agencies, but to building owners. A policy that granted access rights to occupy the limited and crucial telecommunications spaces in multi-tenant buildings to the first TSPs that request to wire a building would be contrary to the long-term interests of competing TSPs, building owners, and most of all, to tenants.

3. Mandatory Access will Create a "Land Rush" that will Reduce Rather than Increase Tenant Choice of Services and TSPs

In a mandatory access environment, it will be critical to be among the *first* TSPs to wire a multi-tenant building, thereby creating a high-speed digital land rush for telecommunications spaces. By making these spaces available to TSPs on a first-come, first-served basis, the Commission will provide TSPs with every incentive to access their "target" buildings quickly and to take up as much space as possible. There will be no incentive for competing TSPs to install or use pathways, spaces, and inside wiring efficiently. Once the telecommunications spaces in a building are full, the building will not be able to accommodate other TSPs. Those TSPs that installed facilities first will enjoy a huge competitive advantage because there simply will not be room in the congested closets and risers for any competitors.

Moreover, building owners would not have the ability to reserve space for future uses and future technologies. Ten or even five years ago, few could have predicted the number, application, and technological sophistication of today's telecommunications services, the number of new companies formed to provide them, or the increasingly vital role they play in our world. Mandatory access rules do not consider the possibility that in a few years new TSPs offering cutting-edge services will be shut out of buildings because unmanaged facilities installations left no room for them. The long-term planning necessary to prevent this occurrence would be impossible for the Commission to perform in each of the hundreds of thousands unique multi-tenant buildings across the country and would be unwisely entrusted to TSPs with interests that lie in the opposite direction—yet it is part of what a multi-tenant building owner does every day.

Even without mandatory access rights, TSPs are currently focusing on gaining access rights to buildings rather than providing services to tenants. This is highlighted by the fact that TSPs regularly inform their shareholders of the number of buildings for which they have signed access agreements; these TSPs, however, rarely disclose how many buildings they are actually serving. Mandatory access will only put more pressure on TSPs to be one of the first through the door, not necessarily one of the best.

4. Mandatory Access will Interfere with the Natural Economic Limitations on TSP Access and Services within Multi-tenant Buildings

In addition to physical constraints, there are also economic limitations on the number of TSP facilities that can be supported within a particular building. It is costly for a TSP to establish a point of presence in a building and to install the facilities necessary to serve the tenants. Accordingly, a TSP that answers to its shareholders must be assured that there is a viable economic opportunity to make a return on its investment. As more TSPs gain access to a particular building, however, the economic opportunity for new entrants is greatly diminished. In the absence of mandatory access rules, the building owner would be able to ensure that the initial TSPs in the building are those that can best serve the needs of the tenants, before the economic restraints become applicable.

Where mandatory access rules are in place, however, the owner has no say in which TSPs are the first through the door and thus runs the risk that the most appropriate TSPs for its tenants will decline to bring their facilities to the building because the telecommunications opportunity in the building is already saturated.

This economic barrier recently presented itself to Cornerstone Properties. Cornerstone has been highly successful in bringing competitive telecommunications services to its tenants. In the present example, Cornerstone previously entered license agreements with at least four separate TSPs in one of its buildings in Denver. Recently, two more TSPs requested access to the same building for their facilities. Cornerstone sought to accommodate them. After inspecting the building, however, the TSPs declined to provide services, in part because the building was already being served by several other TSPs and they did not see a viable economic opportunity for their services. Fortunately, Cornerstone had ensured that the existing TSPs were meeting the telecommunications needs of its tenants. In a mandatory access environment, however, the four TSPs that deterred the entrance of new competitors would be so positioned simply by virtue of their “early bird” status, not based on their ability to best serve the building’s tenants.

Likewise, many shared tenant service (“STS”) providers claim that a building can only support one such provider and there is simply not a market for multiple STS providers within the same building. Once an STS provider enters a building, an economic barrier will prevent any others from serving the tenants. Accordingly, it is imperative that the building owner has significant input as to which TSPs are serving the tenants, and not forced to simply rely upon the TSPs that are first in line through mandatory access rights.

5. Mandatory Access would be Contrary to FCC Policy as set out in 47 C.F.R. §68.3

The Commission has established rules allowing building owners to assume control of and responsibility for ILEC inside wire from a demarcation point established at the Minimum Point of Entry ("MPOE") (47 C.F.R. §68.3). One of the goals of section 68.3 is that by making building owners, and not the ILEC, responsible for the inside wires, competitive TSPs would have easier access to those wires. It makes no sense on the one hand to make building owners responsible for the ILECs inside wiring, and on the other hand to mandate that the building owner allow all other competitive TSPs unlimited rights to install, own, and manage additional inside wire in the same building. For this reason, mandatory access rules would be wholly inconsistent with the established inside wire policies articulated through section 68.3. Indeed, in states such as California and Illinois where the ILECs have already declared MPOE under the Commission's rules, it would be fundamentally unfair to building owners who are currently responsible for the inside wire to be forced to allow other TSPs to install duplicative facilities.

B. Service-Based Competition is a Viable Alternative to Ensuring Tenant Choice Among TSPs

Many building owners will continue to allow TSPs to install facilities in building in order to provide services to tenants. Other owners, however, may determine that the best way to promote competition in their buildings is not by allowing each TSP to install their own facilities, but to require all TSPs to share the inside wire facilities. This method of giving tenants access to competitive telecommunications services and TSPs bypasses the space and economic problems associated with mandatory access. Accordingly, the Commission should also promote service-based competition by unbundling ownership from access rights by requiring TSPs to share the use of their facilities located in multi-tenant buildings with competing TSPs.

1. <u>Service-based Competition Satisfies the Commission's Goals for Promoting Local Competition in Multi-tenant Buildings</u>

As discussed in detail above, despite the growing level of telecommunications competition in multi-tenant buildings, barriers still remain—ILECs' continued demands for unlimited access rights, the narrow target markets of competitive TSPs, and the limited telecommunications spaces and economic opportunity available in buildings. While the first two barriers will likely be overcome as competition in all markets strengthens,[3] one potential barrier—lack of space—will only become greater as more and more TSPs seek facilities-based access to multi-tenant buildings. In the Notice, the Commission touches upon the most viable long-term solution to overcoming these barriers and ensuring that tenants will always have access to the services and TSPs of their choice. It does not, however, go far enough.

Specifically, within §B(3) of the Notice, the Commission asks if the ILEC's inside wires should be unbundled and made available to its competitors. The answer is a qualified yes. Building owners concerned about space limitations (and other issues, such as maintaining security) should have the right to insist that TSPs either use each others' inside wires to gain connectivity to building tenants, or that the TSPs use a neutral

[3] As competition increases, ILECs will no longer have the market strength to demand special treatment and, thus, building owners will have the meaningful ability to require the ILECs to agree to the same terms and conditions for building access as the owners do for other competitive TSPs in their buildings. Likewise, as existing markets mature, competitive TSPs will be looking to new markets for expansion.

cabling platform. Thus, the solution is not only to unbundle the ILEC's inside wires, but for all TSPs to de-couple the ownership and control of the inside telecommunications wires from the right to access tenants over those wires. Under these circumstances, TSPs will be competing not to place their wires in the building but to high quality and low cost services to tenants.

This approach is analogous to the Commission's regulation of pay telephones. Since allowing the registration of coin operated payphones 15 years ago, the Commission has permitted payphone operators ("PPOs") to negotiate exclusive arrangements with premises owners authorizing the PPO to be the sole provider of payphones on the premises. (See *Registration of Coin Operated Telephones under Part 68 of the Commission's Rules and Regulations*, 57 RR 2d 133 (1984)). For example, a PPO is permitted to own all the pay telephones in an airport in exchange for offering the owner of the airport a commission of profits from the pay telephones. The Commission has been careful, however, to ensure that the grant of payphone monopolies by premises owners to PPOs does not limit consumer choice. In a series of decisions in 1991 and 1992, the Commission issued rules requiring PPOs to ensure that consumers are granted "equal access" to all interexchange carriers and operator services providers. (See *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rule Making, 6 FCC Rcd 4736 (1991); Order on Reconsideration, 7 FCC Rcd 4355 (1992); see also 47 C.F.R. § 64.704 (1999)).

This approach permits property owners to negotiate exclusive agreements with a single payphone provider, which facilitates the process for property owners and avoids the duplication of equipment on owner premises. However, consumers are not shortchanged by this arrangement, since the PPOs are required to “open” their network to permit a payphone customer to access their desired provider.

Thus, in the airport example, while the PPO is granted a monopoly over equipment placement at the airport, in that other PPOs would not be permitted to place their equipment at the airport, consumers are still given an abundance of choice and can select any carrier to handle their needs. In short, the lack of duplicative equipment at the airport does not injure consumer choice. In much the same way, the lack of duplicative inside wiring would not affect a consumer’s ability to choose from multiple TSPs.

The Commission should adopt a similar approach with respect to inside wiring. Rather than require property owners to be burdened with numerous contracts and duplicative inside wiring, the Commission should mandate the unbundling of inside wiring in order to permit tenants to access the TSP of their choice.

The use of a single or limited number of backbone systems conserves scarce building telecommunications spaces. Proper design of such systems can accommodate both traditional and enhanced telecommunications services. Making the systems available to multiple TSPs at non-discriminatory terms and fees will create a competitively neutral path for signals between TSPs and tenants. For a TSP eager to engage in service-based competition, access to tenants upon reasonable terms and conditions is critical, while owning the wiring is not.[4]

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[4] Ultimately the owner will decide on the extent and type of communications facilities installed in the building. While typically an owner wants high-quality service in order to attract tenants, the owner should not be compelled to provide any particular level of service. Tenants need not rent space if the building’s infrastructure does not meet their needs.

2. TSPs can use Either Unbundled Facilities Owned by a TSP or Facilities Owned by the Building to Provide Services

Telecommunications facilities in buildings are owned or controlled by one of two parties: a TSP or the building owner (or its representative). The Commission can meet its goals for local competition within multi-tenant buildings by promoting service-based competition on either type of facility.

a. Both ILEC and Competitive TSP Wires in a Building can be made Available to all Other TSPs Seeking Access to Tenants

A competitor who owns and controls a link in the distribution chain of a valuable commodity for which a competitor has no economic alternative should be required to provide access to others over that link. Likewise, because there are physical and economic restraints on the number of telecommunications systems that can be supported in a building, any TSP that installs a such system in a building should be required to allow all other TSPs to use that system under reasonable terms to deliver its own services to its customers in the building.

The Commission touches on this issue in its Notice when it seeks comment on the potential treatment of in-building cable and wiring by an ILEC as an unbundled network element under §251(c)(3) of the 1996 Act. Unbundling the ILEC's inside wire would make it available to competitors at tariffed rates, thereby ensuring service-based competition in multi-tenant building.

While unbundling ILEC inside wire will help open the doors to service-based competition in some buildings, it will not be the answer in all buildings. ILEC inside wire in older buildings may be so antiquated or congested that it is no longer usable. Likewise, in buildings where ILEC's have established the network demarcation at the

MPOE in accordance with Commission rules, such as in California and Illinois, the ILEC no longer controls the inside wires and, therefore, cannot make them available for use by other TSPs. Thus, the Commission should apply these rules to all TSPs, not just the ILEC.

The Commission's regulatory authority over TSPs is clearly sufficient to require each TSP that owns or controls inside wires (both voice-grade and high-speed copper and fiber) within a multi-tenant building to provide access to all TSPs under fair, reasonable, and non-discriminatory terms. The Commission also has jurisdiction to issue guidelines about what kinds of user fees and terms would be reasonable, and to resolve disputes between TSPs in those instances where agreement cannot be reached.

The TSPs that invest in the facilities can earn a return on their investment by charging user fees to TSPs using the facility, but cannot overprice their telecommunications services by restricting access within the building and insulating their services from the discipline of competition.

There is no need for the Commission to regulate building owners. Indeed, economic and market forces in the commercial and multi-residential rental real estate markets today present more than ample incentives for building owners to provide tenants with ready access to high-quality and reasonably priced telecommunications services. With this record of success, the Commission should continue to allow building owners the latitude to manage their telecommunications resources, along with other building assets, for the overall benefit of the tenants.

b. Building Owners can make a Neutrally Managed Platform Available to TSPs by Installing a CDS or Declaring MPOE

Some building owners (or a third party under the direction of the owner) have chosen to install, own, operate, and manage an independent communications distribution system ("CDS") within multi-tenant buildings, or to take control of an existing CDS (as in California, where PacBell established the network demarcation point at the MPOE and gave control of its inside wires to the building owner), as described in the attached *Technical Report*. By doing this, the owner can ensure that the system meets the needs of all tenants, is designed and installed to make the best use of constrained space, and is operated in a fair and non-discriminatory manner by a neutral party (i.e. not by a competing TSP). Again, as discussed in the attached *Technical Report*, this approach has resulted in a telecommunications environment that meets or exceeds the level of competition that the Commission hopes will develop for tenants everywhere.

A comprehensive cable management plan allows the building owner to assign copper pairs to TSPs and tenants upon request, with the assurance that the connections can be made quickly and easily. This system reduces the labor required by the TSP and charged to the end user. Such management also minimizes traffic in the telecommunications closets and the main cross-connect room, thereby enhancing the integrity and security of the tenants' and building's telecommunications systems, maximizing the use of the infrastructure, and minimizing capital investment. A pro-active cable management system allows the building owner to maximize the number of TSPs that can be supported in the building. This would also meet the Commission's goal of increasing local exchange competition in multi-tenant buildings to benefit tenants.

In the context of ensuring that tenants have access to their choice of TSPs, the Commission seeks comments relating to FCC Rule Part 68.3. The Commission adopted Part 68.3 with the intent of, among other things, making it easier for competing TSPs to gain access to tenants by using the ILEC-installed inside wiring. Part 68.3 allows building owners the right to establish the network demarcation point at the MPOE and assume control of ILEC inside wire. These MPOE rules are another action that the Commission has taken to help promote services-based competition.

In order for MPOE to be an effective tool, however, the Commission should clarify owners' right to declare MPOE without encountering unreasonable delays, terms, fees, or other roadblocks by the ILECs. Specifically, in those states where the ILEC has not made it standard practice to establish the network demarcation point at the MPOE, it has been virtually impossible for a building owner to do so under the rules. For example, several of the Joint Commenters have attempted to declare MPOE with respect to thirty-three specific buildings in thirteen different states and with seven different ILECs. The ILECs rebuffed them each time, as discussed in the *Technical Report*.

In addition, the demarcation point should be for all types of inside wiring, not just voice-grade copper cable. Technologies are converging in ways that require harmonization of rules. In building after building, local, long distance, Internet, data, and cable television services are becoming virtually indistinguishable in terms of physical requirements and signal delivery capabilities. The demarcation point should also apply to all TSPs, not just to ILECs. It makes little sense to place the ILEC's demarcation point at the MPOE if other TSPs are unilaterally permitted to install and operate their own cable plants throughout a building.

C. TSPs Should not be Allowed to Demand Exclusive Agreements for the Purpose of Excluding other Carriers

The Notice asks a number of questions regarding the appropriateness of exclusive agreements between building owners and TSPs. The Joint Commenters agree that in general, broadly written exclusive contracts are not desirable. While the granting of limited exclusive rights may be appropriate in certain circumstances (such as for a particular service, for a limited period of time, or for marketing support), we recognize that exclusive TSP agreements may inhibit tenant choice of services and TSPs. Accordingly, given today's market conditions, building owners rarely grant TSPs exclusive rights to provide services in buildings. However, the building owner should be allowed to determine when an exclusive agreement might be appropriate to ensure that tenants in the building have access to competitive telecommunications services.

Exclusive agreements may be appropriate where there is grant of exclusive rights to provide only a very limited scope of services. For example, shared tenant service ("STS") providers often claim that such services, while extremely valuable to some tenants, have limited appeal and require a significant capital investment. As a result, most buildings may not be able to support multiple STS providers. Therefore, in order to give tenants the option of selecting an STS provider, the owner may need to grant that provider exclusive rights.

Another area where exclusive (or semi-exclusive) agreements are appropriate is where the building owner provides marketing support to the TSP. Marketing support may be as passive as providing the TSP with tenant names or as active as distributing marketing information and hosting presentations by TSPs. In these instances, the owner is closely aligning itself with the TSP and the TSP's services, almost to the extent of creating a partnership. This kind of exclusive agreement should always be permitted. A building owner should not be required to actively support the sales effort of one TSP simply because it does so with another TSP. Who an owner chooses to align itself with should be left solely to the discretion of the owner. Moreover, exclusive marketing agreements do not inhibit a tenant's ability to choose among competitive TSPs.

Further, in various instances, TSPs refuse to provide services in certain buildings—particularly in smaller or suburban buildings—unless the owner grants some form of exclusive rights. While this practice was more prevalent before the 1996 Act, some TSPs still claim that exclusivity is necessary to entice them to build their networks out to a building, or in order for them to recover their costs of providing service in these buildings. Given the difficulty in bringing competitive TSPs to some buildings, building owners seeking to provide their tenants with competitive services face a difficult choice when TSPs make such demands.

Other than preventing TSPs from demanding unlimited exclusive agreements for the purpose of excluding other providers, there is little action that the Commission must take with regard to this issue. As discussed throughout this document, building owners have a strong economic incentive to meet the needs of their tenants. Again, in today's market, it is the rare exception where the building owner will agree to long-term exclusive contracts with TSPs. However, such a decision lies properly with the building owner, and not with the Commission, for every situation is different and the building owner is in the best position to balance the competing needs in order to offer to its tenants the best telecommunications services available.

D. Utilities do not Have Surplus Rights-of-Way in Buildings

In the Notice, the Commission considers whether TSPs can use the "rights-of-way" of other utilities, pursuant to §224 of the 1996 Act, in order to gain pathway space rights to install their facilities. In addition to the myriad of legal issues this extension of rights would raise (which are being addressed by other parties, including BOMA), this will simply not be a practical solution.

First, utilities in multi-tenant buildings generally do not own or control surplus rights-of-way. Some, in fact, do not own or control any rights-of-way. For example, in many circumstances, electric distribution lines are not owned by the electric utility, but rather are part of the internal infrastructure of the building. To the extent that the electric utility or gas company does own its own wires or pipes in the building, its rights-of-way generally are limited to the space actually needed and/or to their specific utility functions. These companies do not have rights to any additional space that could be useful to a TSP. Even the ILECs that still own the inside wiring in a building lack the right to install additional equipment or cabling without the building owner's permission. Thus, even if competitive TSPs had the right to use the rights-of-way of utilities, in most cases such rights would not provide them with any greater access than that obtained with the owner's permission.

Use of existing rights-of-way can also cause significant safety problems in the buildings. Allowing competitive TSPs indiscriminate use of existing rights-of-way in buildings will take away building owners' ability to balance the competing tenant needs in a building. For example, surplus electric rights-of way may be necessary to accommodate the future power needs of tenants. If these spaces are filled by TSPs that are providing duplicative telecommunications services, some tenants may be left without enough electricity.

In any event, §224 of the 1996 Act relates solely to pole attachments owned and controlled by "utilities." As defined by the 1996 Act, "utility" is explicitly confined to local exchange carriers, electric, gas, water, steam, and other public utilities, and does not include multi-tenant building owners, managers, and agents.

E. Building Owners Should be Allowed to Charge TSPs with Facilities in the Building for Space, Access, or Opportunity

TSPs (including ILECs) that seek a point of presence in a building take up valuable floor, riser, rooftop, and pathway space and place additional burdens on the building, including increased security risks and general maintenance costs. Building owners should not be forced to subsidize TSPs by providing free or low-cost space, access or opportunity in the building. Accordingly, it is appropriate for building owners to charge market-negotiated fees to TSPs that require a point of presence in the building.

As in any other real estate transaction, the fees charged to a TSP should reflect the fair market value of the space, access, or opportunity granted to the TSP. Given the significant market pressures on both the TSP and the building owner to have TSPs provide competitive services to tenants, the fair market value of the opportunity can be determined through negotiation between the TSP and the owner. There is no reason to treat TSPs any differently than another tenant or service provider in the building.

Some TSPs argue that if they are required to pay fees at all, fees should be set at a certain amount. Some suggest that fees should be based upon the floor space they are using in an equipment room. Some suggest fees should be based upon the size or height of the building. Still others suggest that the amount should be based upon a share of the revenue that the TSP is receiving in the building. As discussed previously, however, each building and the opportunities it presents are unique. There simply is not a one-size-fits-all formula for determining a fair market price for space, access, or opportunity. What may be appropriate in one building with one TSP may not be suitable in another building with another TSP.

The essence of the 1996 Act is to allow telecommunications competition to flourish. It is built upon the foundation that competition will drive the quality of service and the price for those services. Building owners should not be denied the very principles that underlie the 1996 Act—that market forces will drive a competitive environment. Here, the fees that TSPs should pay for space, access, or opportunity in multi-tenant buildings should be established through market forces, not through unnecessary regulation in an industry that has already demonstrated its responsiveness to the marketplace.

RECOMMENDATIONS

This proceeding provides an opportunity for the Commission to clarify and emphasize its policies favoring the rapid development of competition in local telecommunications markets. Unfortunately, some of the factors that limit the pace of development are not susceptible to regulatory solutions. For instance, it is difficult by rulemaking to increase riser or rooftop space or to enhance TSP interest in wiring smaller, less profitable buildings. The Commission can, however, take certain targeted actions that will greatly benefit local competition now and in the future.

First, we request the Commission to recognize the physical and practical limitations for facilities-based competition and the need to manage such competition for the benefit of tenants, not TSPs. Concurrently, we request the Commission to emphasize that it desires greater local competition in terms of quality, variety, reliability, and price of the telecommunications services, not in terms of a competitive scramble to own and control facilities within buildings so one TSP can restrict or discourage access by its competitors.

Second, we request the Commission to recognize the prominent role to be played by building owners and managers in the management of limited telecommunications space within multi-tenant buildings, including the ability to condition and limit the deployment of TSP facilities and to choose to own and operate a CDS.

Third, we urge the Commission to require all regulated TSPs owning or controlling telecommunications facilities within multi-tenant buildings to provide access to tenants by competing TSPs over available capacity on those facilities. The

Commission could issue guidelines on appropriate fees and terms for access agreements, and be available to resolve disputes between TSPs.

Fourth, we request the Commission to allow building owners to limit the number of TSPs that install wiring in a building, provided that competing TSPs are allowed to use the facilities to access tenants under terms that are not unreasonably discriminatory.

Fifth, we request the Commission, because of limits of its statutory jurisdiction over building owners and in recognition of the market forces that effectively limit the behavior of building owners, to refrain from attempting to require owners to provide space within buildings for any or all TSPs desiring to install facilities, and, when space is licensed to a TSP, regulating the terms and conditions of the license.

Sixth, we request the Commission to clarify its earlier mandates that gives building owners the right to declare MPOE without unreasonable delays, fees, roadblocks, or other non-competitive tactics by ILECs.

Seventh, we request the Commission to require ILECs to enter license agreements with building owners that include essentially the same terms and fees as license agreements between owners and TSPs that compete with the ILECs, and also, when determining whether or not a competitive local environment exists for purposes of allowing an ILEC to enter long-distance markets, consider whether or not the ILEC has entered into such license agreements.

Eighth, we request that the Commission, in requiring utilities to share rights-of-way with TSPs, also recognize that utilities cannot share what they do not own, such as easements that are limited to occupancy solely by the utility.

Finally, we request the Commission to acknowledge the great progress that has been made in buildings owned by the Joint Commenters and others in bringing competitive local telecommunications choices to tenants through good management of the limited telecommunication spaces within multi-tenant buildings.

CONCLUSION

The Joint Commenters, comprised of Cornerstone Properties, Crescent Real Estate, Duke-Weeks Realty, Hines Interests Limited Partnership, Legacy Partners, The Lurie Company, Metropolitan Life Insurance Company, Prentiss Properties, Rudin Management Company, Shorenstein Company, Spieker Properties, and TrizecHahn Office Properties, respectfully ask the Commission to recognize the efforts and the role of building owners in bringing telecommunications competition to their tenants and to take the specific actions outlined in the Recommendations above.

Dated August 27, 1999

/s/ .
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